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No. 96-1321

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

BROWN UNIVERSITY, *et al.*,
Petitioners,

v.

AMY COHEN, *et al.*,
Respondents.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION, INDEPENDENT WOMEN'S FORUM, AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether a university that seeks to offer varsity sports teams that accommodate equally the athletic interests of qualified men and women can be liable for "discrimination" on the "basis of sex" within the meaning of 20 U.S.C. § 1681(a) of Title IX based solely on evidence that (1) the percentage of women participating in varsity athletics is lower than the percentage of women in the student body; and (2) there are some women in the student body who want to play on a viable varsity team that is not funded as part of the university's athletic program.

2. Whether this Court's jurisprudence requires, instead, that in determining whether women have been "subjected to discrimination," 20 U.S.C. § 1681(a), the relevant statistical comparison is between the gender composition of the varsity athletes and the gender composition of the qualified and interested potential athletes in the student body population.

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INTEREST OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with thousands of supporters who live in all fifty states. Through litigation, participation in the administrative process, and publication, WLF seeks to promote and protect the free enterprise system and the economic and civil liberties of individuals and businesses.

WLF has a record of longstanding interest and involvement regarding the controversial issues of affirmative action, racial and gender quotas, and reverse discrimination. In pursuit of its view that the Constitution and the civil rights laws protect all citizens against discrimination, WLF has appeared before this Court as well as other federal and state courts in many of the leading cases in the area. *See, e.g., Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995); *Shaw v. Reno*, 113 S. Ct. 2816 (1993); *Metro Broadcasting, Inc. v. Federal Communications Comm'n*, 497 U.S. 547 (1990); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984).

The Independent Women's Forum (IWF) is a non-partisan, non-profit organization of women who believe in limited government and equal opportunity for all Americans. IWF participated as an *amicus curiae* in support of Brown University in this case before the United States Court of Appeals for the First Circuit.

The Allied Educational Foundation (Allied) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, ALLIED is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici believe that the decision below in this case is wrong as a matter of law and incorrect as a matter of public policy. The court of appeals' decision, if not reversed by this Court, will cause immediate and serious harm to the varsity athletic opportunities of both male and female athletes in virtually every university throughout the nation. Moreover,

in areas other than athletics, the lower court's analysis would undermine the opportunities of women by imposing numerical limits based on proportional representation without regard to the interest levels and abilities of male and female students.

Amici submit this brief with the consent of Petitioner and Respondent. Consent letters have been lodged with the Clerk of the Court.

STATEMENT OF THE CASE

In the interest of judicial economy, *amici* adopt the Statement of the Case contained in the brief of petitioners, Brown University, *et al.* (referred to herein collectively as "Brown").

In brief, the appellate court concluded that Brown had violated Title IX and discriminated against women by failing to fund a sufficient number of women's varsity athletic teams. Specifically, Brown failed to satisfy the three-part test contained in a 1979 Department of Health, Education, and Welfare ("HEW") Policy Interpretation because Brown could not demonstrate that the percentage of its women varsity athletes was "substantially proportionate" to the percentage of women in the student body. Nor, according to the lower court, could Brown demonstrate that it had "a history and continuing practice of program expansion," despite the fact that Brown had added 14 funded women's varsity teams to its athletic program between 1971 and 1977, added a women's winter track team in 1982, and currently funds many more women's sports teams than virtually every university in the United States. App. at 204a, 206a; 334a. Finally, the court ruled that Brown was not "fully and effectively"

accommodating the interests and abilities of women athletes because there were some women who had demonstrated the interest and ability to participate in a viable varsity athletic team. App. at 141-42a. *See* 44 Fed. Reg. at 71,418. Thus, the First Circuit concluded that, unless a university has achieved substantial proportionality, it must fund each and every viable women's team or violate Title IX.[1]

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[1]The three-part standard articulated by the HEW provides, in full, that universities will be found in compliance if:

> (1) "intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to the respective enrollments"; or
>
> (2) "the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of [the underrepresented] sex"; or
>
> (3) "it can be demonstrated that the interests and abilities of the members of [the underrepresented] sex have been fully and effectively accommodated by the present program."

44 Fed. Reg. 71, 418. When this standard was first issued, the Office for Civil Rights for the Department of Education ("OCR"), the agency responsible for Title IX enforcement, interpreted this guidance to require universities to "meet the interests and abilities of women *to the same degree* as they meet the interests and abilities of men." OCR Title IX Intercollegiate Athletics Investigator's Manual ("OCR Manual") at 122 (1980) (emphasis added). App. at 291-93a. Subsequently, during the course of this litigation, OCR changed its view and embraced the First Circuit's interpretation of the three-part standard. *See* "Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test" dated Jan. 16, 1996 and cover letter from Norma V. Cantu. App. at 294-316a.

Both the district court and the First Circuit largely ignored the overwhelming and uncontradicted evidence introduced at trial by Brown that, among its prospective and current students, the number of men interested in participating in varsity athletics greatly outnumbers the number of women interested in varsity athletic participation. Specifically, Brown's expert demonstrated that only 38-39 percent of the prospective applicants who sent College Board questionnaires to Brown indicating that they planned to participate in varsity sports were women. App. at 320a, 331a, 336a. Similarly, women comprised only 42-45 percent of Brown's applicants for the classes of 1994 through 1998 who expressed an interest in participating in sports. App. at 319a, 329a. In addition, the relative participation rate of men to women in Brown's intramural program -- which has no limit on the number of students that can participate -- is eight to one, App. at 334a, and men outnumber women in Brown's club sports by a margin of three to one. App. at 335-36a.[2]

The First Circuit rejected Brown's view that Title IX "discrimination" must be analyzed by comparing the gender composition of varsity athletes to the gender composition of the interested and able potential athletes within the student population. The court found that the concept of a qualified pool "has no place in a Title IX analysis of equal opportunities for male and female athletes" because this approach would "undermine[] the remedial purposes of Title

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[2]This evidence was gleaned through a review and tabulation of data from the 65,829 applications received by Brown for the classes of 1994 through 1998. *See* App. at 318. In addition, Brown's expert reviewed several large nationally representative data sources, including a review of seven different surveys conducted by independent institutions concerning young men's and women's interest and participation in sports at the national level. App. 320-27a.

IX by limiting required program expansion for the underrepresented sex to the status quo level of relative interest[]." *Cohen v. Brown*, 101 F.3d 155 (1st Cir. 1996) ("*Cohen IV*"), App. at 30a, 37a. The court reasoned that "even if it can be empirically demonstrated that, at a particular time, women have less interest in sports than do men, such evidence, standing alone, cannot justify providing fewer athletic opportunities for women than men" because women's lesser interest in sports is strictly the product of "women's historical lack of opportunities to participate in sports." *Id.*, App. at 42a, 40a.

REASONS FOR GRANTING THE WRIT

The First Circuit's decision effectively requires universities to reconfigure their varsity athletic program so that it either "mirrors the student enrollment as closely as possible," *Cohen v. Brown*, 991 F.2d 888 (1st Cir. 1993) ("*Cohen II*"), App. at 118-19a, or so that it funds positions for each and every female athlete in the student body interested in competing on a viable team. In determining compliance with Title IX, universities may not take into consideration the existing interest levels and athletic abilities of their current population of female students, nor may they consider the number or percentage of interested and able male student athletes who are not being accommodated by the athletic program. Instead, under the reasoning of the decision below, universities are *required* to allocate coveted athletic opportunities to female students on a preferential basis.

This Court should grant review and overturn the lower court's decision for several important reasons. The First Circuit's decision directly conflicts with this Court's well-established line of precedent requiring courts to measure

discrimination in decision-making by reference to the "qualified pool" of individuals eligible to benefit from the decision. *See, e.g., Wards Cove v. Antonio*, 490 U.S. 642 (1989); *Hazelwood School Dist. v. United States*, 433 U.S. 308 (1977). The decision below, which specifically rejected the qualified pool concept and, instead, relies on statistical disparities between the percentage of female athletes and the percentage of women in the student body *as a whole*, is irreconcilable with these decisions.

Moreover, the decision below is having an immediate detrimental effect on the athletic programs of virtually every American university, and, as such, presents issues of exceptional importance that warrant resolution now. Universities across the country are restructuring their athletic programs to strip male student athletes of athletic opportunities -- by shifting funding away from male teams, by strictly limiting the size of male athletic teams, and by wholly eliminating many male teams -- in an attempt to increase the relative percentage of participating female athletes. Not only do these machinations unfairly give preferential treatment to female athletes, many of these efforts have *little or no* effect on the raw number of opportunities provided for women athletes. Instead, they serve primarily to deprive male student athletes of their once-in-a-lifetime opportunity to participate in college athletics.

Finally, the issues raised by the lower court are of exceptional importance because of their application outside of the arena of varsity athletics. Title IX applies to *all* university programs, not just athletics. The logic of the decision below threatens to force strict gender proportionality in all aspects of university life, including *inter alia* class, major, and degree

enrollments, dormitory room allocations, and extracurricular activities.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS WHICH REQUIRE COURTS TO MEASURE DISCRIMINATION BY REFERENCE TO THE "QUALIFIED POOL"

In a long line of decisions discussing statistical proof of discrimination, this Court has given the lower courts clear direction as to the appropriate statistical inquiry. In determining whether discrimination can be inferred from statistical disparities, the proper comparison is between the number of individuals selected for whatever program is at issue and the number of persons *qualified* to participate in the program. *See Wards Cove*, 490 U.S. at 650-51 (rejecting as irrelevant comparison between percentage of nonwhite cannery workers and nonwhite noncannery workers; proper comparison for the initial inquiry in a disparate impact case is "between the racial composition of the qualified persons in the labor market and the persons holding the at-issue jobs"); *Hazelwood*, 433 U.S. at 308 ("The Court of Appeals was correct in the view that a proper comparison was between the racial composition of Hazelwood's teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market."); *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989) (emphasizing that an "inference of discriminatory exclusion" can only be made where there is "a significant statistical disparity" between the "number of qualified minority contractors *willing and able* to perform a particular service and the number of such contractors actually engaged [in the service]") (emphasis added); *Jackson v. Harvard University*, 721 F. Supp. 1397, 1430 (D. Mass. 1989), *aff'd*, 900 F.2d 464

(1st Cir.), *cert. denied*, 111 S. Ct. 137 (1990) (rejecting disparate claim based solely on the percentage of black female tenured faculty at Harvard Business School without comparison to the "qualified labor market for Harvard Business School professors").

These decisions demonstrate that plaintiffs relying on statistics to establish discrimination must provide statistical evidence based on the number of qualified and available potential *applicants*, and not based upon the population at large. The decision below here, however, ignored this Court's clear direction. Rather than conducting any analysis whatsoever of the qualified pool of potential female student athletes at Brown, both the district court and the First Circuit simply brushed aside as irrelevant this entire inquiry.

Indeed, the First Circuit went so far as to hold that even empirical proof of differing interest levels between male and female students would not justify disparate participation levels in athletics. *Cohen IV*; App. at 42a. Thus, according to the First Circuit, in order to remain within the safe harbor of substantial proportionality, Title IX *requires* that Brown force or cajole lesser-interested female students to participate in varsity athletics. Failing that, Brown must immediately fund and accommodate any and every female athlete that wishes to participate in varsity athletics on a viable team. Leaving aside the practical difficulties of implementing either program, it is certainly not what Title IX demands. Indeed, 20 U.S.C. § 1681(b) specifically prohibits the "grant [of] preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total

number or percentage of persons of that sex in any community, State, section, or other area."

Contrary to the statements of the First Circuit, both the text of Title IX and this Court's decisions in *Wards Cove* and *Hazelwood* explicitly recognize that disparities of interest, talent, curiosity, and capability can and will exist between various populations of racial groups and the genders. These differences do not violate anti-discrimination laws or the Equal Protection Clause. The First Circuit's decision, which inexplicably rejected this well-settled law, is improper and should be overturned by this Court.

II. THE PETITION PRESENTS ISSUES OF EXCEPTIONAL IMPORTANCE THAT WARRANT RESOLUTION BY THIS COURT AT THIS TIME

A. The First Circuit's Interpretation Of Title IX Is Having An Immediate And Detrimental Effect On The Athletic Programs Of Virtually Every University In The Country

In *Wards Cove*, this Court explained that failure to focus on the correct statistical inquiry -- between selected individuals and qualified, available individuals -- leads to a flawed analysis and can lead to a clearly wrong "solution" to the "discrimination" found. The First Circuit's interpretation of Title IX has lead to precisely such a wrong solution.

Wards Cove involved two populations of workers: noncannery workers, who were mainly white, and cannery workers, who were primarily nonwhite. 490 U.S. at 647. The lower court improperly concluded that discrimination was

shown by focusing on the racial disparities between the two groups of workers. *Id.* at 648-49. In rejecting this analysis, this Court noted that this statistical comparison was meaningless because it could be made to vanish simply by legitimate manipulation of the defendant's hiring practices. As this Court reasoned, "Under the Court of Appeals' approach, therefore, it is possible that *with no change whatsoever* in their hiring practices for noncannery workers. . . petitioners could make respondents' prima facie case of disparate impact `disappear,'" simply by hiring fewer nonwhite workers at the cannery. *Id.* at 654 (emphasis in original). This "solution" to the "discrimination" found by the lower court would obviously be of no benefit to petitioners, the nonwhite workers.

A similar analysis demonstrates the erroneous nature of the First Circuit's decision here. By ignoring the guidance of this Court that the equality embodied in Title IX requires universities to meet the interests and abilities of its male and female students *to the same degree*, the First Circuit has required universities, instead, to implement strict proportionality between the gender mix of its athletes and its student body. Such an alteration in the percentages of male and female athletes participating in the overall athletic program can be achieved most easily, however, simply by cutting and limiting the varsity opportunities for male student athletes. This "solution" is, obviously, of little or no benefit to women athletes or students, and inflicts severe and irreparable harm on existing male student athletes.

There is ample evidence to indicate that drastic cutting of varsity athletic opportunities for male athletes is precisely what is happening across the country in the wake of the First Circuit and other court's erroneous interpretation of Title IX.

At the outset, it is important to understand the widespread effect of a requirement for strict proportionality on virtually every university in the nation. At most, *no more than a very small few* of the hundreds of universities in this country have been able to implement strict proportionality in their athletic program. *See, e.g.,* Jim Naughton, *More Colleges Cut Men's Teams To Shift Money To Women's Teams,* The Chronicle of Higher Education, February 21, 1997 at A39 ("research indicates that only about 10 per cent of the country's colleges are in compliance with the law, and that true proportionality might be non-existent"); Mary Jordan, *Only One School Meets Gender Equity Goal*, The Washington Post, June 21, 1992 at D1. Thus, the First Circuit's interpretation of Title IX will have an impact on nearly every existing athletic program in the country.

The adverse effect on male athletic programs has already begun in earnest. Indeed, nearly every week, there are additional reports in the press of universities eliminating men's varsity teams in an attempt to comply with the strict proportionality ostensibly required by Title IX. *See, e.g.,* Jessica Gavora, *Quota System Hurts Team*, USA Today, July 23, 1996, at 14A (UCLA eliminated men's swimming and diving team that had produced 22 Olympic medalists, including 13 gold medals); Andy Boogaard, The Fresno Bee, Feb. 11, 1996, at D7 (Wyoming discontinues men's baseball after 30 years); Jerry Soifer, The Press Enterprise, Oct. 31, 1995, at D2 (over past several years, University of California (UC) Riverside, UC Santa Barbara, UC Irvine, Cal State Fullerton, and Cal State Long Beach have all eliminated men's football team); The Times Union, Aug. 30, 1995, at B1 (men's wrestling, swimming, and tennis eliminated at University at Albany); Elton Alexander, The Plain Dealer, Apr. 6, 1994, at 3D (Kent State plans to cut men's gymnastics

and ice hockey teams leaving it with 8 women's and 8 men's athletic teams); David Barron, The Houston Chron., June 29, 1993, at 1 (men's basketball program eliminated to make way for women's softball); John Maher, *Out of the Running*, Austin American-Statesman, Jan. 22, 1995, at 1 (Blinn College dropped world-renowned man's track program, which produced 11 Olympians and a gold medal winner at the 1992 games).

Whole sports -- most notably, men's wrestling, swimming, and gymnastics -- have been nearly extinguished at the university level. In a period of ten years, men's wrestling lost 120 programs. Paul Kenyon, *The Buck Stops Here: Budgetary Decisions Hinge on Title IX*, Providence J. Bull., Feb 28, 1995. at 2F. Over the last two decades, at least sixty-four universities have discontinued their men's swimming program. In 1976, 138 NCAA universities offered men's gymnastic programs. Twenty years later, only thirty-two varsity teams remain in the whole nation. Jessica Gavora, *Quota System Hurts Team*, USA Today, July 23, 1996, at 14A. *See also* Jim Naughton, *Colleges Weigh Impact Of Ruling On Gender Equity In Sports*, The Chronicle of Higher Education, Dec. 6, 1996, at A57 ("Financial concerns have led many universities to drop men's programs such as baseball, wrestling, gymnastics, and cross-country, which produce no revenue and drive up the number of female athletes a university needs to achieve proportionality."); Bonnie DeSimone, *Show of Hands Saves Men's Gymnastics*, The Plain Dealer, Jan. 11, 1995, at 1D ("Men's gymnastics, the spotted owl of collegiate sports, will maintain its precarious perch for at least two more years."); Tom Witosky, *Iowa Coach Wrestles With Impact*, Des Moines Register, May 9, 1995, at 2C (Iowa wrestling coach testifies before

Congress; "wrestling programs are becoming Title IX casualties").

These, and many of the other men's programs most threatened by the current interpretation of Title IX, are Olympic sports, for which the university system has traditionally provided the vast majority of competitive training. As Robert Cowan, then-men's national program director for the U.S. Gymnastics Federation predicted, "It's the death of Olympism. People don't need to worry about the NBA of the NFL. They should be much more concerned about the survival of Olympic programs." Jeff Metcalfe, *Olympic Suicide; Experts Analyze ASU Athletic Program Cuts*, The Phoenix Gazette, Feb. 28, 1993, at G3.

In their attempts to reach proportionality, universities have not only cut whole teams, but have placed strict limits on the size of the roster of the remaining men's teams, thereby effectively eliminating "walk-on" opportunities for non-scholarship athletes. Jim Naughton, *More Colleges Cut Men's Teams To Shift Money To Women's Teams*, The Chronicle of Higher Education, Feb. 21, 1997, at A39. In this way, universities have sacrificed a very low-cost way of providing athletic opportunities to interested male students to the goal of strict numeric parity.

The adverse effect of the these cuts are severe and long lasting. Individual male college athletes, obviously, have only a single two- or four-year opportunity to participate in and reap the benefits of varsity athletics. Once this singular opportunity is missed, it cannot be revisited. Similarly, universities that dismantle longstanding recruiting, training, and competitive programs cannot easily reconfigure them. Rebuilding discontinued teams can be expected to take

several years, lengthening the duration of the harm to affected male student athletes.

The real tragedy of the courts' distorted view of Title IX is that it inflicts tremendous harm on male student athletes without providing a comparable benefit to female student athletes. As Brown amply demonstrated at trial and other commentators agree, women students as a whole are measurably less interested in varsity athletics than men students. *See* Jim Naughton, *Colleges Weigh Impact of Ruling On Gender Equity In Sports*, The Chronicle of Higher Education, Dec. 6, 1996, at A57 (quoting Louis M Guenin, a member of the division of medical ethics at the Harvard University Medical School; "The evidence has mounted from published studies and experience that a smaller portion of female than male undergraduates desire varsity play. This has dramatized the untenability of requiring that the ratio of male to female athletes equal the ratio of male to female students."). Thus, schools that wish to move to gender parity are forced artificially to restrict male athletic opportunities to the current level of female interest -- harming male athletes while providing little or no benefit to female athletes.

In addition, schools that cut programs to achieve substantial proportionality will be very reluctant to expand their varsity athletic program in the future for either sex, resulting in an effective "freeze" on athletic programs for athletes of both sexes. As one commentator noted in a discussion of this litigation:

> If Brown University currently has 500 men but only 300 women participating in varsity athletics (close to the actual numbers), the institution can comply with Title IX by reducing the number of male

> athletes to 300. Then Brown University women who might want to participate in the future miss out forever on the opportunity, and so do 200 Brown University men. Where are the winners?

Stephen P. Erber, *Proportionality Will Rebuff Both Male And Female Athletes*, The Chronicle of Higher Education, Dec. 6, 1996, at B6.

B. The Application Of The Current Reading Of Title IX Outside Of The Athletic Context Will Harm Both Male And Female Students

Title IX applies not just to athletics, but to "any education program or activity." 20 U.S.C. § 1681(a).[3] Thus, the First Circuit's interpretation of Title IX to require gender parity (or the full accommodation of every member of the underrepresented sex), could logically be extended far beyond the athletic context with disastrous effects for students of both sexes.

There are numerous areas of campus life in which male and female students elect to participate in differing numbers. In selected activities, ranging from the noncompetitive athletic arena to the arts, participation by women greatly exceeds that of men. For example, evidence introduced by Brown indicates that 91 percent of all applicants expressing an interest in dance are women, 56 percent of all applicants indicating an interest in drama are women, and 66 percent of

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[3]The breadth of Title IX's coverage was specifically reaffirmed by the Civil Rights Restoration Act of 1987, 20 U.S.C. § 1687, which explicitly extended the reach of Title IX to all aspects of an educational institution receiving federal assistance.

the applicants interested in music are women. App. 1217a. The logic of the lower court's decision would allow any man that was denied a space in an oversubscribed acting, dance, or music class to demand that women be dropped to make room for a number of men proportionate to their enrollment in the student body. Indeed, a man who believes that the theatrical pieces presented by the Drama Department do not offer an adequate number of parts for men or do not cater to male dramatic tastes could assert a similar demand.

Similarly, the mix of undergraduate degrees conferred differs between the genders. Recent statistics from the Department of Education indicate that 69 percent of Bachelors Degrees awarded in the physical sciences in 1989/1990 went to men, while 85 percent of the engineering degrees in that same year went to men. *See* Table 250, *Earned Degrees Conferred*, Digest Of Educational Statistics, U.S. Dep't of Education, 1992. Conversely, women outnumber men in the number of degrees conferred in many areas of the arts and humanities. *Id.* Obviously, these statistics suggest that women and men undergraduates differ in their academic interests. The demands of proportionate representation imposed by the lower court decision here, however, could be read to require that universities begin enforcing substantial proportionality in the awarding of science and engineering degrees. The result of this would be the award of fewer science degrees to men, reducing the overall number of scientists and engineers in society, or a reduction in standards for science and engineering degrees -- either of which would have tragic results for health and safety.

Innumerable other examples could be cited, but it is clear that the mechanical application of gender proportionality without regard to the interests and abilities of undergraduate

students has the potential to cause a variety of absurd and counterproductive results. These results, which arbitrarily limit the opportunities of members of one gender based on the aggregate interest level of the other gender, undermine rather than further the central goal of Title IX by diminishing rather than expanding the opportunities for male and female students.

CONCLUSION

For the foregoing reasons, *amici* WLF, IWF, and Allied respectfully request that this Court grant the petition and issue a writ of certiorari to the First Circuit.

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